INDEX

	Pages
Statement of facts	1
Argument	2

AUTHORITIES CITED

Yick Wo v Hopkins, 118 U. S. 356	2
Windsor vs Whitney, 11 Atl 354, 12 ALR 669	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 799

S. M. GORIEB, Plaintiff,

versus

CHARLES D. FOX, et als., Defendants.

REPLY BRIEF OF COUNSEL FOR THE PLAINTIFF.

Statement of Facts:

The facts in this controversy have already been stated in petition for writ of certiorari on Pages 2, 3, and 4 of said petition, however, for the convenience of the court a short statement of the facts will be given.

The petitioner is the owner of several lots, in the City of Roanoke Virginia, lying in about the center of the City, on an improved street, in a semi-business district, with stores in the block

above and stores and garages in the block below, a house used for a residence is on a portion of said property, but the Western portion of said property, a corner lot has not been improved and there is no building thereon. (R. 23 to 35 inclusive.)

The record shows that the unimproved property is undesirable for residential purposes and has a value of about $3,000.00, but for business property is worth about $10,000.00 (R. 24, 26.)

The City of Roanoke Virginia by a city ordinance has prohibited the petitioner from the use of that part of the property lying along the street for building purposes, and the city council has refused to grant a building permit for the erection of a building nearer to the street than 34.2 feet. (R., 13) The property has little or no value as business property with the building erected 34.2 feet from the street. (R., 25, 26, 27, 36.)

Argument:

In the brief of Counsel for the defendents it is set out that the rule in the case of Yick Wo vs Hopkins, 118 US, 356 should not apply to the case now before the court. It is claimed that the City Council has no discretion as to whether a street line shall or shall not be established in a given case, but by the terms of the ordinance the council is permitted in its discretion to permit a building to be erected closer to the street

than the established line. In other words the council is authorized and empowered to give to one person and withhold from another person the right to improve his property under like circumstances and conditions. The language of the ordinance of Roanoke City and the ordinance in the case of Yick Wo vs Hopkins is the same, in both cases persons are prohibited from the use of property, unless special permission is granted from the governing power. In the case of Yick Wo vs Hopkins the fire danger of conducting a laundry in wooden buildings, may have been controlled under the Police Power, but in this case the ordinance of the City of Roanoke is so loosely drawn that no real standare of placing the houses in the street is established. In one block the building line may be in one place and in another block in a different place and every block in the City may be different as to the building line. The ordinance is unreasonable on its face and has no relation to the public health, morals, safety or welfare, but is a Zoning Ordinance enacted under the pressure of the advocates of the so-called "City Beautiful" and at one stride reduces the market value of the petitioners property from $10,000.00 to $4,000.00 (R., 26). The act does not provide for any notice to the owners of property but establishes a line based upon the distance from the street that 60 per cent of the houses have already fixed without giving any rule to guide in the selection of the 60 per cent of the houses

and said line is governed solely by the whims of the City Council to allow a building any distance from the street in one case and to refuse in another under like circumstances and conditions. Never yet has it been held in this country that the right to use and enjoy real property can be controlled by the whims of a City Council or the governing body of town or City.

In large cities some questions of this kind may arise, but in country towns and small cities the modern tendencies of the court to allow the governing bodies unlimited power is unnecessary unjust and very dangerous.

The City does not contend that the ordinance in this case should be upheld as a police regulation for health, morals, safety or welfare, but quotes from the opinion of he court in the Connecticut case of Windsor vs Whitney, 111 Atl 354, 12 ALR 669, the good that might be found in upholding the ordinances in cases not like the case now before the court. In the case of Windsor vs Whitney the property was undeveloped property without streets and without houses while the property of the petitioner is about the oldest property in the City, was residential property twenty years ago and is now semi-business property located in the center of the City, valuable for business property, but of little or no value for a residence. (R., 24 to 35 inclusive).

It is respectively submitted that a line which may be so variously disposed can have no rela-

tion to any of the police powers where the petitioners property is located in a semi-business district with stores in all of the adjacent Blocks, where the Petitioner also owns the adjacent property and is ready, willing and able to build a business building unobjectionable in all particulars erected far enough from every residence to be unobjectionable and it is manifestly unfair that the petitioner be obliged to sell or dispose of his property for which he paid $7,000.00 for $2,000.00 or $3,000.00 because he is denied the right to the use of 34 feet on the front thereof and that the purchaser being influential with the governing body may obtain a building permit for a business building and realize $10,000.00 for the same property immediately. (R., 24-35 incl.) It is also manifestly unfair to the city as well as to the owners of property to tie up the use of real property and prohibit the building of business houses in locations that are semi-business locations as the record in this case shows the petitioners property to be. In this case three of the oldest real estate agents of the City of Roanoke took the stand and testified that the petitioners property was worth about $3,000.00 for residence property and worth about $10,000.00 for business property, that the City in restricting the use of 34.2 feet of the front made the property practically worthless for business property, (R., 24, 35 inclusive) that the only property that could be damaged or injured by the erection of a business building would be

the adjacent property which is owned by the petitioner, (R., 27.)

The many authorities dealing with Zoning Ordinances have recently been cited so many times that it is unnecessary to cite cases in addition to the cases set out in the petitioners opening brief and it is sufficient to say that the Court of Appeals of Virginia, in its opinion, (R., 51-60 incl.) is lead to the conclusion that the Ordinance is constitutional chiefly on account of the Virginia cases that have been heretofore decided by the Virginia Court and the cases cited by the Court in its opinion are cases that are not in point with the case decided and in most instances the cases are not even similar.

Respectfully submitted,

S. M. GORIEB.

By G. A. WINGFIELD,
W. V. BIRCHFIELD, Jr,
His Attorneys.

FILED
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WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1926

No. 799

S. M. GORIEB, *Plaintiff*

VERSUS

CHARLES D. FOX, ET ALS., *Defendants*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

BRIEF OF COUNSEL FOR DEFENDANTS

INDEX.

	Page
Brief of defendant	1
Statement of petitioner's contentions	1
I. Discussion of petitioner's contention "(a)": That Section 243 of the ordinance invests the council of the city with powers purely arbitrary in the matter of granting or refusing permits to erect buildings nearer the street than the established building line.	3
II. Discussion of petitioner's contention "(b)": That the city ordinance constitutes the taking of private property for public use without compensation and violates both the constitution of the Commonwealth of Virginia and the Federal Constitution.	5
III. Discussion of petitioner's contention "(c)": That Section 244 of the ordinance is void for uncertainty and cannot be reasonably construed as including plaintiff's property	14

Table of Cases Cited.

Barbier v. Connoly, 113 U. S., 27	6
Booth v. Illinois, 184 U. S., 425	6
California Reduction Co. v. Sanitary Reduction Works, 199 U. S., 306	6
Eaton v. S. Orange, 120 Atl., 202	8
Eubank v. City of Richmond, 119 Va., 740	8
Hadacheck v. Sebastian, 239 U. S., 394	6
Lasalle v. Ferguson, 202 S. W., 317	8
Pritz v. Messer, 149 N. E., 30	8
St. Louis v. Hill, 31 L. R. A. (N. S.), 229; 22 S. W., 863	8
Val Fruth v. Board of Affairs, 84 S. E., 105	8
Village of Euclid v. Ambler Realty Co. Advance Ops. No. 4, December 15, 1926, page 171	12
Welch v. Swasey, 214 U. S., 91; 53 L. Ed. 923; 29 Sup. Ct. Rep. 567, affirming 193 Mass., 364; 23 L. R. A. (N. S.), 1040; 118 Am. St. Rep., 523; 79 N. E., 745	11
Williamson v. Cook, 44 L. R. A. (N. S.), 1030	8
Windsor v. Whitney, 131 Atl., 361; 12 A. L. R. 693	8, 12
Wulfsohn v. Burden, 241 N. Y., 288; 42 A. L. R., 654	9
Yick Wo v. Hopkins, 118 U. S., 356	4

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BRIEF OF COUNSEL FOR DEFENDANTS

The facts and circumstances out of which this case arose have been stated fully and in detail in the Opinion of the Court of Appeals of Virginia delivered by Judge Jesse F. West and made a part of the record in this Court on pages 54 to 63, both inclusive.

Petitioner makes three contentions for the reversal

of the State court's affirmance of the order of the Court of Law and Chancery of the City of Roanoke dismissing the Petition for Mandamus filed in said court as follows:

(a) THAT SECTION 243 OF THE CITY ORDINANCE INVESTS THE COUNCIL OF THE CITY OF ROANOKE WITH A DISCRETION WHICH IS PURELY ARBITRARY AND FOR THAT REASON IS UNCONSTITUTIONAL.

(b) THE CITY ORDINANCE CONSTITUTES THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION AND VIOLATES BOTH THE CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA AND THE FEDERAL CONSTITUTION.

(c) THAT SECTION 244 OF THE ORDINANCE IS VOID FOR UNCERTAINTY AND CANNOT BE REASONABLY CONSTRUED AS INCLUDING PLAINTIFF'S PROPERTY.

We will very briefly discuss these contentions and assignments in the order in which they are above stated.

I

(a) THAT SECTION 243 OF THE ORDINANCE INVESTS THE COUNCIL OF THE CITY WITH POWERS PURELY ARBITRARY IN THE MATTER OF GRANTING OR REFUSING PERMITS TO ERECT BUILDINGS NEARER THE STREET THAN THE ESTABLISHED BUILDING LINE.

Section 244 fixes what shall be the building or "setback" line, but section 243 provides that "all buildings hereafter to be erected in the City of Roanoke must be built to correspond to the existing house-line of the houses built in the same block, unless special permission otherwise granted by the City Council."

The State of Virginia by the General Enabling Statute referred to in the record plainly undertook to confer upon the City of Roanoke and other cities of the state authority to enact an ordinance of the kind with which we are concerned. There is no question, therefore, concerning the existence of a delegated authority from the state. The ordinance commits the power to grant building permits to meet the situation mentioned in the ordinance to the discretion of the very body which passed the ordinance and to which the legislature has directly delegated the police power of the state, as well as the power to pass such ordinances as were in their judgment necessary for the protection, health, peace, safety and welfare of the inhabitants of their respective cities.

It has often been held that more or less arbitrary discretion may be vested in officers of state or city without rendering the statute or ordinance void on that account. It would hardly be feasible to specify in an ordinance all the conditions which would justify the council in granting or refusing a permit to build closer to the street than the established street line in the interest of the public health, safety and general welfare.

This must necessarily be left to the judgment and discretion of the Council or to some one else, as applied to the particular lot or place. Of course, if a council or other officer, be shown to be guilty of persistently exercising the authority conferred on them in an arbitrary or oppressive manner the Courts might, and doubtless would, hold the ordinance vesting them with such authority to be unreasonable and unconstitutional.

Such a case was presented by the facts in the case of Yick Wo, vs. Hopkins, 118 U. S., 356, so confidently relied on by Counsel for Petitioner.

No such contention, however, is made here. The Council is clothed with no discretion as to whether a street line shall or shall not be established in a given case, but by the terms of the ordinance the council is permitted in its discretion and in order to relieve the hardship in any particular case to permit a building to be erected closer to the street than the established line. The exercise of such functions arising out of the police power has often been exercised and often delegated by City Council to other officers of the city and held to be lawful and proper. The decisions recognizing the validity of such ordinances are cited and discussed in

the Opinion of the Supreme Court of Virginia and need not be further referred to or discussed here.

II

(a) THE CITY ORDINANCE CONSTITUTES THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE WITHOUT COMPENSATION AND VIOLATES BOTH THE CONSTITUTION OF THE COMMONWEALTH OF VIRGINIA AND THE FEDERAL CONSTITUTION.

In approaching this question, it is to be borne in mind that every presumption and intendment must be exercised in favor of the constitutionality of the legislation and the ordinance in question. This rule has been so often stated by the Courts, both State and Federal, that it is unnecessary to cite decisions in support thereof.

The right to acquire, possess and protect property is secured to every one under the Constitution of Virginia and under the Constitution of the United States. Tremendously important as this right to own and to enjoy property is, it is not absolute and unqualified, and is subject to the exercise of what is known as the police power inherent in government. It has often been said, too, that every exercise of the police power relating to the use of land is likely to affect adversely the property rights of some individual. But the fact that the exercise of this power may operate to restrict

the individual citizen in the use of his own property or the conduct of his own business is not sufficient to render reasonable regulations in regard thereto invalid.

Barbier vs. Connoly, 113 U. S., 27;
Booth vs. Illinois, 184 U. S., 425;
Hadacheck vs. Sebastian, 239 U. S., 394;
California Reduction Co. vs. Sanitary Reduction Works, 199 U. S., 306.

It is well known that until a few years ago a haphazard building development prevailed throughout American Cities. Municipalities exercised little or no control over the use of private real estate. Constitutional guarantees and safeguards of private property rights were construed literally. The power known as the "Police Power" of the government, was little understood and rarely invoked to modify the literal and precise guarantees afforded by constitutional provisions to the individual citizen and to prevent him from obstructing the state and the city in the pursuit of such salutary measures of control as are reasonably calculated to protect society in its peace, health, safety, morals and general welfare.

About 1916, however, the method of control and direction of city growth by municipal regulations called "Zoning" was devised and "set-back" lines generally provided.

Prior to that time, the owner of property could use it for any purpose he pleased and in any way he pleased, provided he did not establish and maintain what it is known as a "common law nuisance." The result was chaotic. For want of some sort of well con-

sidered plan of building, each man built with reference to his individual interest only, and in many instances without any reference whatever to his neighbor. Since that time it is well known that such regulations as are provided by the statute and ordinance in question have spread with great rapidity throughout the country.

That there are numerous advantages to be derived from the establishment of set-back building lines, and that the health, comfort convenience and general welfare of the people of a city are promoted thereby would seem to be most obvious. Without some such regulations there is no such thing as orderliness in the building of a city, and it is familiar knowledge that haphazard growth is inefficient, wasteful and unsightly. Front yards afford room for lawns and trees; keep the dwellings farther from the dust, noise and fumes from the streets; add to the attractiveness and comfort of residence sections; create a better home environment, and, providing a greater distance between the houses on opposite sides of the street, tend to reduce the fire hazard. Moreover, the projection of a building beyond the front line of adjacent dwellings cuts off light and air.

The congestion incident to the rapid growth of automobile traffic in recent years has brought the representatives of cities face to face with the cost of condemning buildings in order to widen the streets, and the safety of the traveling public is clearly conserved by removing all dangers incident to hidden corners caused by erecting buildings such as the one proposed

by Gorieb, on the street line at a street intersection corner.

If we look to the decisions of the different courts which have dealt with the question of building, or setback lines, it may be conceded that the contentions of the Petitioner as to the regulations here involved, find support in some of the decisions in some of the states on the ground that such regulations constitute a taking of private property for public use without compensation, and, are therefore unconstitutional.

> Williamson vs. Cook (Colo.) 44 LRA (N.S.) 1030;
> St. Louis vs. Hill (Mo.) 31 LRA, 226; 22 S. W., 861;
> Val Fruth vs. Board of Affairs (W. Va.), 84 S. E., 105;
> Eaton vs. S. Orange (N. J.), 130 Atl., 362.

* * * * * * * * *

A few years ago the weight of authority favored the position that the establishment of building lines under the police power is a taking of private property without just compensation and unconstitutional; but within the last few years the trend of reason and authority indicates an increasing disposition in favor of establishing building lines without compensation.

> Windsor vs. Whitney (Conn.), 111 Atl., 354; 12 A. L. R., 669;
> Lasalle vs. Ferguson (Tex.) 202 S. W., 317;
> Eubank vs. City of Richmond, 110 Va., 749;
> Pritz vs. Messer (Ohio), 149 N. E., 30;

Wulfshon vs. Burden, 241 N. Y., 288; 43 A. L. R., 651.

The case of Windsor vs. Whitney, supra, is an illuminating and convincing discussion of the subject. Speaking of the numerous advantages of set-back lines the Connecticutt Court in that case said:

"Adequate space for light and air will be given. Such a plan is a wise provision for the future. It betters the health and safety of the community; it betters the transportation facilities; it adds to the appearance and the wholesomeness of the place, and as a consequence, it reacts upon the morals and spiritual power of the people who live under such surroundings. The demands of a large city may excuse congestion, but in a small city or country town, there is no use for such living conditions; but unless some authority regulates and controls the land development, we may look for too narrow streets, too few or no building lines, and buildings erected unstable in character, unsuitable in material and inappropriate in construction. All our large communities have their examples of the unregulated layout of streets and buildings, of instances of land development so as to yield the last penny to its promoters, regardless of the public welfare; of community eye-sores; of streets made over; whose sections changed because of the beginning, no reasonable provision was made for the safety, health or welfare of the community. Such an act as this is conceived in public wisdom and serves great public needs. Courts will be reluctant to destroy

it, and with its beneficent purposes. We should not do this unless we were clearly satisfied that the act was against our fundamental law, or was so unreasonable as to be beyond the range of the police power."

Again on page 674 the court deals with the question in this way:

"If a building line six feet from an owner's street line will tend to preserve the public health, add to the public safety from fire, and enhance the public welfare by bettering living conditions and increasing the general prosperity of the neighborhood, can it be done by legislative authority in the exercise of the police power, where such an exercise of the police power is reasonable under the circumstances of the case? We hold that it can, and that this is not a taking of property in violation of the constitutional right, for which compensation must be made. The body of the law upon the subject of the police power is the growth of comparatively recent years. It has been said to be still in the formative stage.

"The line between eminent domain and the police power is a hard one to hold with constancy and consistency, and it is not surprising that now and again these two great powers of government have been confused. A few years ago it was, so far as the rule had been announced, undoubted that restrictions could not be imposed upon a private property solely for aesthetic considerations. Later it has been said by high authority that aesthetic considerations may be regarded in con-

nection with recognized police power considerations. And now Dillon in the latest edition of his "Municipal Corporations," Sec. 695, says: "The law on this point is undergoing development, and perhaps cannot be said to be conclusively settled as to the extent of the police power."

Welch vs. Swasey, 214 U. S., 91; 53 L. Ed., 923; 29 Sup. Ct. Rep. 567, affirming 193 Mass. 364; 23 L. R. A. (N.S.) 1160; 118 AM. St. Rep., 523; 79 N. E. 745, tends to justify the author's conclusion.

Where the free exercise of one's rights of property is detrimental to the public interest, the state has the right to regulate reasonably such exercise of control under the police power. And that, of course, means without compensation."

* * * * * * * * *

A closely kindred question arises in connection with the numerous ordinances enacted in many states and cities relative to what is known as zoning. It is obvious that a restriction against building at all on a given lot is a serious invasion of property rights. A consideration, therefore, of the cases in various jurisdictions sustaining the constitutionality of zoning ordinances proper is important as throwing light on the attitude of the courts regarding the subject of set back lines. While there is conflict of opinion, the decided weight of authority upholds the validity of zoning ordinances as a proper exercise of the police power.

Village of Euclid vs. Ambler Realty Co., Advance Opinions of United States Supreme Court No. 4, December 15th, 1926, page 171.

It ordinances which provide that certain buildings lawful in their use, such as garages, gasoline filling stations, etc., may not be erected in residence sections, are sustained as a valid exercise of the police power, similar, if not the same, reasons would seem to dictate that set back building lines should be sustained.

In Windsor vs. Whitney, supra, the Connecticutt Court says:

> "The regulation of the location and width of streets and the establishment of building lines, is by no means as much of an impairment of the right to use property as are the provisions of our statutes regulating tenements and lodging houses. These limit the area of the lot which the tenement house shall occupy. They provide for rear yards. They regulate the air space, light and ventilation of rooms, and in many other ways the state restricts the use of such property by an owner."

Patterson Avenue is one of the few beautiful streets in Roanoke City. The section in which the plaintiff proposes to erect a storehouse is essentially a residence section. The people who live along the street have built neat residences well set back from the street. They have given this property value along the street as a residence street. The Petitioner has contributed nothing whatever to the section, but proposes to come

in and take advantage of the section, and to make a use of his property, if permitted, that would do great injury to other property in the block, and in that section. As we have seen, every citizen holds his property subject to the exercise of the police power. The exercise of this power for the public welfare may inconvenience individuals, increase their labors, and decrease the value of their property, but will not, on that account, be held unconstitutional.

The value to any given property holder of protecting himself against possible injury through the construction on neighboring property of a building set directly up to the line of the sidewalk, is of more consequence than the theoretical loss to himself of the privilege of building up to his own line. It is stated that in actual practice the advantages and disadvantages are about equal.

For the arguments and reasons above advanced, it is earnestly insisted that the ordinance and the provisions of the ordinance in question, tend to promote the health, safety, comfort, prosperity and general welfare of the inhabitants of the City of Roanoke, or one or more of these purposes, and that neither the city ordinance nor any of its provisions deprive the plaintiff of the lawful use of his property, without due process of law, but, on the contrary, are a valid and legitimate exercise of the police power expressly granted by the Legislature of Virginia to the City of Roanoke.

III

(c) THAT SECTION 244 OF THE ORDINANCE IS VOID FOR UNCERTAINTY AND CANNOT BE REASONABLY CONSTRUED AS INCLUDING PLAINTIFF'S PROPERTY.

Under this assignment, it is contended that the ordinance was drawn to meet a condition where sixty per cent of the houses in a block on both sides of the street are uniform, and that here they are not uniform.

SECTION 244 of the Ordinance, page 25 of the record provides:

> "That the line of the existing houses shall be the line upon which sixty per cent of the houses in the block in which the proposed building is intended to be erected, have with relation to the street, and the said proposed buildings must be at least as far from the street as the line established by said sixty per cent of the houses."

The section further provides:

> "The word "block" herein used does not refer to any entire city square, but shall be construed to be that portion on the same side of the street upon which the new building is proposed, bounded by the nearest intersecting streets to the right and left of the said proposed building."
>
> * * * * * * * * *

By an inspection of Exhibit and Map filed by E. B. Jacobs and Company, pp. 18 and 19 of the record, it will be seen that there are five houses on the side of the

street on which Gorieb proposed to erect his building and eight on the other side, and that the five houses on the same side of the street, and within the same block as the Gorieb proposed building are as follows:

No. 1001 Patterson Avenue.....37.5 feet
No. 1005 Patterson Avenue.....44.2 feet
No. 1009 Patterson Avenue.....44.2 feet
No. 1027 Patterson Avenue.....44.3 feet
No. 1023 Patterson Avenue.....49.2 feet

Two of the lots are a uniform distance of 44.2 feet and a third lot is 44.3 feet, making only a difference of one-tenth of a foot between the lots. This difference falls within the doctrine of de minimis, and so construed, gives sixty per cent uniformity on the one side as required by amended ordinance. In the construction of an ordinance all of its provisions should be given effect to, if possible. And it is submitted that there is no such uncertainty in the language as to justify the conclusion that the ordinance in question cannot be enforced. While the line established by sixty per cent of the houses would be 44.2 feet from the street, and under section 244 of the Ordinance the Gorieb building would have to be located 44.2 feet from the street line, as pointed out by the Virginia Court, if the Council erred in permitting him to build 34.2 feet from the street, it was error in his favor, of which he cannot complain.

Respectfully submitted,

CHAS. D. FOX, *et als.*

By Robt. C. Jackson, City Solicitor.